

Dame Mary Kinsey, Widow
and Administratrix of
Sir Tho. Kinsey, Plt.

The Defendant's

Henry Hayward, Execu-
tor of John Hayward,
Def.

C A S E.

*In a Writ of Error upon a Judgment of the King's Bench,
Reversing a Judgment in the Common Pleas.*

The CASE upon the Record stands thus:

9 Will. III.

THE Plaintiff Dame Mary Kinsey brought an Action on the Case against the Defendant Hayward, in London, for Fifty Pounds, upon an *Indebitatus assumpsit*: And likewise for another Fifty Pounds, upon an *Insimul computasset*, wherein the Plaintiff alledges, That the Testator John Hayward did in his Life time promise to pay the same.

Plea.

To this Action the Defendant appeared, and Pleaded, That the said Testator John Hayward non *Assumpsit* within Six Years before the Suing forth the Plaintiffs Writ, which was the Ninth of April, 1697.

Replication.

The Plaintiff Replied, That the said Sir Thomas Kinsey, in his Life time, (to wit) the Eighth of May, in the Fourth Year of the late King James the Second, did Sue out of Chancery an Original Writ *De quodam Placito Transgressionis* against the Testator Hayward, directed to the Sheriff of Dorset; by which the said Sheriff was commanded to attach the said John Hayward, to shew Cause why, by Force and Arms, the Close of the said Kinsey the Intestate he had broke, & alia *Enormia ei intulisset*, against the Peace of the King. And says, this Writ was taken out with an Intent, upon the Testator's Appearance, to have declared against him, according to the Course of the Court of Common Pleas, for the said Fifty Pounds. But the said John did not appear thereunto, but died on or about the First of April, 1693. Whereupon the said Sir Thomas, recen-ter, (*cilicet*) *duodecimo Aprilis, Anno Regni Domini Regis Gulielmi & Domine Mariæ Reginae, Quinto*, did Sue out another Original in Trespass, against the now Defendant Henry, as Executor to the said John; which said Writ was likewise directed to the Sheriff of Dorset, commanding him to attach the said Henry, to answer, in Easter Term then next following, Why he broke his Close with Force and Arms in Dorsetshire. But the said Henry did not appear thereunto. And that the said Sir Thomas Kinsey, *postea, (scilicet)* on the Fifth of February, in the Eighth Year of King William the Third, died.

Whereupon the said Mary, his Administratrix, on the Nine and twentieth of April, in the Ninth Year of King William the Third, did Sue out against the now Defendant, into London, the Original Writ in this Action in *Placito Transgressionis super Casum*; And says, the Cause of this Action did first accrue within the Six Years next before the Suing out of the said first Original.

Demurrer.

To this Replication the Defendant Demurred, and the Plaintiff Joyned in Demurrer, and obtained Judgment in the Common Pleas.

Whereupon the now Plaintiff brought his Writ of Error, and removed the Judgment of the said Court of Common Pleas into the King's Bench; and the Court of King's Bench heard several Arguments at the Bar, and fully Examined the same; and at length, after serious Deliberation for several Terms, the said Court of King's Bench did unanimously give Judgment for the Reversal of the said former Judgment; And that a Writ for Breaking a Close in Dorsetshire could not be an Original Writ for a Debt in London. Which Judgment of the Court of King's Bench, 'tis hoped your Lordships will affirm, in regard that such Writ can in no wise be Justified in this Case, nor is Warranted by the Course of the Court: For clearly it will appear to be contrary to Law, and against Sense and Reason, to make a Writ, taken out into Dorsetshire, *Quare Clausum fregit*, to be the Original to support an *Indebitatus assumpsit*, which is laid in London.

*Note the Court of Common Pleas was not unanimous in giving
their Judgment.*

Ja. Mountague.